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Supreme Court of the United States

OCTOBER TERM, 1965

No. 1141 93

SENFOUR INVESTMENT CO., INC.,
Appellant,

v.

KING COUNTY,
a Legal Subdivision of the State of Washington,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

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SENFOUR INVESTMENT CO., INC.,
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KING COUNTY,
a Legal Subdivision of the State of Washington,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

This appeal is from the final judgment of the Supreme Court of Washington affirming the authority of one of its political subdivisions, King County, to levy and collect a tax upon the sale of property carried out in execution of the Trustee in Bankruptcy's plan authorized and confirmed by the Bankruptcy Court (Chapter X corporate reorganization proceedings), which sale constituted the final disposition and liquidation of the debtor following an adjudication of insolvency. Appellant submits this statement to show that the Supreme Court of the United

States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Washington, filed July 15, 1965 (66 Wn.2d 629) and the denial of the petition for re-hearing thereof on October 25, 1965, shown in the remittitur issued on the same date are reproduced in Appendix A hereto.

JURISDICTION

This suit was commenced in the Superior Court of the State of Washington for King County (Seattle) for the refund of real estate sales taxes paid by the Trustee under protest. The trial court granted summary judgment in favor of Senfour Investment Co., Inc., and the taxing authority, King County, appealed to the Supreme Court of Washington which by judgment becoming final on October 25, 1965, simultaneously with its denial of the petition for rehearing, reversed the judgment of trial court (Appendix A). Notice of this appeal was filed in that court on January 20, 1966. The jurisdiction of this Court to review that decision by direct appeal is conferred by 28 U.S.C. Sec. 1257(2). The finality of the judgment below reversing the summary judgment which had directed the refund of taxes, and the availability of review by appeal in this court are sustained by *Richfield Oil*

Corp. v. State Board of Equalization, 329 U.S. 69 (1946); *Local No. 438 v. Curry*, 371 U.S. 542 (1962); *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948); *Rio Grand Western R. Co. v. Stringham*, 239 U.S. 44 (1915). The appropriateness of this appeal is further sustained by *California State Board of Equalization v. Goggin*, 191 F.2d 726 (9th Cir. 1951), certiorari denied 342 U.S. 909 (1951), *California State Board of Equalization v. Goggin*, 245 F.2d 44 (9th Cir. 1957); *Laurens Federal Savings & Loan Association v. South Carolina Tax Commission*, 365 U.S. 517 (1961); *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946); *Eau Claire National Bank v. Jackman*, 204 U.S. 522 (1907); *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359 (1954); *Clark v. Williard*, 292 U.S. 112 (1934).

QUESTIONS PRESENTED

In proceedings for the reorganization of a debtor corporation (appellant's predecessor and assignor, the Heart of Seattle Hotel Co., Inc.) the United States District Court, Western District of Washington, entered an order adjudging the debtor corporation insolvent (R. 0009) and subsequently confirmed the trustees's amended plan for reorganization (R. 0015), which required the disposal by sale of all of the debtor's assets. The trustee carried out the plan and in the execution thereof, sold the hotel

premises to a corporation (the appellant, Senfour Investment Co., Inc.) formed pursuant to the plan for reorganization to purchase the assets of the debtor in order to consummate the plan. King County imposed the Washington State real estate sales tax upon the sale according to the provisions of Revised Code of Washington 28.45. The tax was paid under protest. Therefore:

1. Is the sale of the capital assets of an insolvent corporation in reorganization proceedings subject to state and local taxes (otherwise applicable to such sale) when that sale is carried out in execution of the plan confirmed by the Bankruptcy Court and constitutes the ultimate disposition of the debtor in the bankruptcy proceedings?

STATUTES INVOLVED

The statutes involved are 28. U.S.C. Sec. 960 and R.C.W. 28.45 (020.050.-080) which are set forth verbatim in Appendix B hereto.

STATEMENT

In February 1963 proceedings were commenced in the United States District Bankruptcy Court (Western District of Washington, Northern Division) for corporate reorganization of the Heart of Seattle Hotel Co., Inc. (No. 51268), a Seattle hotel company owning and operating a single hotel property in Seattle. On August 5, 1963, the United States District Bankrupty Court adjudi-

cated the debtor corporation insolvent (R. 0009) and on August 13, 1963, that court confirmed the trustee in bankruptcy's amended plan for reorganization (R. 0015) which provided for the sale of every asset of the debtor. (The trustee's amended plan is set forth in full as Appendix C hereto.) The proposed sale was carried out by the trustee, and as to the real property constituting the hotel premises the sale was made the object of an assessment of the real estate sales tax collected from the seller under the provisions of R.C.W. 28.45. The tax was paid under protest by the trustee in bankruptcy and subsequently an assignment of the tax refund claim was made to Senfour Investment Co., Inc.

This suit for refund taxes was commenced October 15, 1965 where in its complaint Senfour claimed exemption of the sale from taxation under provisions of the National Bankruptcy Act (R. 0002). In support of its motion for summary judgment in the trial court, Senfour urged that the sale was not subject to state and local taxation within the purport of 28 U.S.C. Sec. 960:

> "Any officers and agents conducting any business under authority of a United States Court shall be subject to all Federal, State and Local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

for the reason that it was in resolution of the reorganization rather than in the conduct of business. Summary judgment ordering the taxes refunded was entered on

July 17, 1964,[1] by the Superior Court of King County and an appeal was taken by King County. On appeal, Senfour argued as in the Superior Court, that the sale by the trustee had been made in execution of the judicial exercise of the paramount bankruptcy power of the United States in what was tantamount to liquidation of the debtor corporation (pertinent portions of Senfour's brief are reproduced in Appendix D hereto). The Washington Supreme Court, by its opinion filed July 15, 1965, and becoming final upon denial of the petition for re-hearing October 25, 1965, reversed the trial court, concluding that since reorganization contemplated something other than "regular bankruptcy," a sale, albeit a total sale after adjudication of insolvency and in execution of the plan, was not exempt from state and local taxation:

> "A chapter 10 reorganization is not in the true sense a bankruptcy and the corporation is regarded as a going concern, not defunct. . . . If, on the other hand, the reorganization plan is not acceptable to the court, the petition may be dismissed or transferred into regular bankruptcy for liquidation. This suggests a liquidation bankruptcy proceeding is different from a chapter 10 reorganization.
>
> "Obviously, Congress did not intend, under chapter 10 and these circumstances, to exclude the collection of this tax."

The Supreme Court of Washington acknowledged that no fact issue existed (Appendix A-1) thus rendering its

1. The prerequisite that there be no issue of material fact being present, Washington Court Rules, Pleading, Practice and Procedure 56, *Lundgren v. Kieren*, 64 Wn.2d 672, 393 P.2d 625 (1964).

decision a square challenge on the issues specified herein.

The Supreme Court of Washington also commented erroneously upon applicable Federal Law:

> ". . . Title 28, Section 960, amended later to Section 670 (11 U.S.C.) of the United States Code Annotated." (Appendix A-2)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The judgment of the Supreme Court of Washington (1) that a trustee in bankruptcy's sale transferring the assets of the insolvent corporation in execution of the plan authorized and confirmed by the Bankruptcy Court, is subject to state and local taxation, and (2) that liquidation may not take place under proceedings initially commenced for the purpose of corporate reorganization, would if novel prepositions of law pose serious questions warranting full briefs, or argument in detailed considerations by this court. This is not necessary, however, because all of these matters, as hereinafter discussed, have been authoritively decided. Accordingly the judgment of the Supreme Court of Washington should be summarily reversed.

1. The decision of the Washington Supreme Court authorizing the imposition of a real estate sales tax upon the trustee in bankruptcy's sale of the debtor's capital assets, after adjudication of insolvency and in execution of the plan authorized and confirmed by the Bankruptcy

Court is in direct conflict with the decisions of the United States Court of Appeals (ninth circuit) in *California State Board of Equalization v. Goggin*, 191 F.2d 726 (9th Cir. (1951) certiorari denied. 342 U.S. 909 (1951) *California State Board of Equalization v. Goggin*, 245 F.2d 44 (9th Cir. 1957). See also *In re West Coast Cabinet Works*, 92 F. Supp. 636 (S. D. Cal. 1950).

The trustee's sale of the Heart of Seattle Hotel property, following the order of insolvency, was the final disposition of the insolvent corporation and constituted the execution of the Bankruptcy Court's essential function. The Court of Appeals in the *Goggin* cases predicated its ruling upon the nature of the sale: whether made in the conduct of the debtor's business, or in execution of the determination of the Bankruptcy Court in exercising the essential purpose of the bankruptcy laws. The United States Court of Appeals stated (in *California State Board of Equalization v. Goggin*, 245 F.2d 44 9th Cir. 1957):

> "The last time the problem came up in this court,[2] the taxing statute was in the exact terms which it now contains, as was the congressional law permitting officers of the Bankruptcy Court to pay taxes to the state for acts done in the conduct of the business. We then held that a state tax upon a sale of tangible property under order of the Bankruptcy Court directing liquidation was a levy upon the process of the Court of the United States and a burden upon its officers in an essential judicial function. . . .

2. This was in 1951, in *California State Board of Equalization v. Goggin*, 9th Cir. 191 F.2d 726, 27 A.L.R.2d 1211, *certiorari* denied, 242 U.S. 909.

"Essentially, as applied to a liquidation sale in bankruptcy, this tax constitutes a burden on the process of liquidation. . . .

"The rational of the opinions in the most recent decisions of this Court on this power is that any impost upon the essential liquidation process of the Bankruptcy Court is void. This has been the consistent policy and holding of the court. . . . The trial courts are entitled to rely upon such earlier pronouncements. . . . In practice, if the sales tax was levied upon the trustee, he would necessarily have passed the tax on to the purchaser. The same result is obtained by taxing the purchaser requiring a trustee to collecting the impost from the purchaser. All these devices are proscribed as to liquidating sales in bankruptcy.

"Whatever the protean forms of a statute may be, or whatever subtle ingenuity of legislative tax advisors suggest now or in the future, the tax is in fact upon the sale; the sale is for the essential purpose of liquidating; the liquidation process was burdened thereby. The paramount authority in a bankruptcy field can be limited only by Congress. But, since Congress has already designated sales in the course of operation of a business as the sole area where the state is permitted to impose a tax of any type, essential sales in liquidation are inevitably free from such imposition. . . .

. . .

"The former opinions of this court drew an exact distinction between sales 'in the conduct of any business' and sales in the liquidation of the bankrupt estate pursuant to court order. . . .

. . .

". . . Any act which hinders, delays or burdens the accomplishment of this vital purpose constitutes an unlawful interference with the process of the court of bankruptcy and is invalid. . . .

"Congress passed a specific statute relative to a trustee engaged in business in order to conform to the burdens borne by other members of a particular business communities. This enactment reads:

"'Any officers or agents conducting any business under authority of a United States Court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.' 28 U.S.C.A. §960.

"The trustee has paid sales tax or used taxes to the state during the period in which he operated the business of the County Stamping and Manufacturing Corporation for seven years under this statute. But the agents of the state are not satisfied, but desire to foster conflict between state and federal authorities. We admonished them in our former opinion that this is an unwise course of procedure. We said:

"'It would be unwise to foster conflict with Congress as manifested a desire for harmony. Any such conflict would necessarily entail an application of the fundamental doctrine that laws enacted pursuant to power delegated the United States under the constitution of the Supreme Law of the land, . . . Also to the doctrine that where problems in the sphere of dual sovereignty are involved, legislation should receive a construction which permits both to function with a minimum of interference with the other.' Citing *Metcalf and Eddy v. Mitchell*, 1926, 269 U.S. 514..."

The decision of the Supreme Court of Washington determining the applicability of federal law (28 U.S.C. Sec. 960) to a federal function (the trustee's sale under bankruptcy proceedings) is inimical to the initiative and power of the bankruptcy court in carrying out the reorganization of corporations, and challenges the authority

of the Federal Judiciary to determine the limits of state and local taxation upon that federal function.

Unarguably the sale by the trustee in bankruptcy in the Heart of Seattle Hotel matter, was not in the conduct of the business of the debtor but eminated from and was wholly in execution of the function of the bankruptcy court for the purposes of achieving the resolution of the reorganization.

2. The declaration of the Supreme Court of the State of Washington that liquidation may not be the end result of proceedings commenced for corporate reorganization is likewise in conflict with federal judicial determination.

> "In conclusion, we wish to point out that a plan of reorganization which does not return a debtor to its original stockholder is not *per se* objectionable and that reorganization may permissibly take the form of liquidation as was contemplated by the Sixty Trust Plan. See, for example, In re *Midland United Co.* (D.C. Del. 1944) 58 F. Supp. 667," *In re American Bantam Car Co.*, 193 F.2d 616 (3rd Cir. 1952).

That reorganization may take form of liquidation has elsewhere been held in *In re Chelsea Hotel Corp.*, 246 F.2d 133 (3rd Cir. 1957); *In re Automatic Washer Co.*, 226 F. Supp. 836 (D.C. Minn. 1964); *In re Hercules Service Parts Corp. v. U.S.*, 202 F.2d 938 (6th Cir. 1953).

The declaration by the Washington Supreme Court that 28 U.S.C. Sec. 960 has been amended to become 11

U.S.C. Sec. 670 (671) (Appendix A-2) is an ancillary erroneous declaration.

CONCLUSION

The imposition of the Washington real estate sales tax upon the Trustee in Bankruptcy's final disposition of the debtor after an adjudication of insolvency is patently within the doctrine of the *Goggin* cases (any distinction between "regular bankruptcies" and reorganizations notwithstanding). No useful purpose would be served by going over that ground again. Accordingly appellant urges that the judgment below be summarily reversed.

Respectfully submitted,

JEROME M. JOHNSON
ROBERT B. LESLIE
CROSON, JOHNSON & WHEELON
Attorneys for Senfour Investment Co., Inc.

March 11, 1966

APPENDIX A

Opinion of the Supreme Court of Washington of July 15, 1965 (66 Wn.2d 629, 404 P.2d 760)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SENFOUR INVESTMENT CO., INC., *Respondent*, v. KING COUNTY, a municipal corporation, *Appellant*.	No. 37840 Department One

BRADFORD, J.†—In this appeal, there is no dispute as to the facts. Jay G. Larson, acting as trustee in reorganization of the Heart of Seattle Hotel Co., Inc., under chapter 10 of the National Bankruptcy Act in the United States District Court, presented a plan for reorganization which was accepted and approved by the court. All of the petitioner's assets were transferred under this plan to Senfour Investment Co., Inc. The Federal District Court found, in its order approving the plan for reorganization, that the plaintiff corporation had been formed to purchase the assets of the debtor, Heart of Seattle Hotel Co., Inc., and that the debtor was insolvent. The defendant, King County, assessed a tax of $3,000 based on the value of the real property transferred, under

†Judge Bradford is serving as a judge *pro tempore* of the Supreme Court pursuant to Art. 4, § 2(a) (amendment 38), state constitution.

R.C.W. 28.45, which tax was paid under protest by Jay G. Larson and his claim was then assigned to the plaintiff. Plaintiff brought this action against the defendant alleging in its complaint "That the sale [of real estate] was pursuant to a plan of liquidation of the Heart of Seattle Hotel" and was immune from taxation under the National Bankruptcy Act. The defendant contends this transaction was an arrangement and is taxable under the terms of Title 28, §960, amended later to §670, of the United States Code Annotated.

The trial court held that Jay G. Larson was a liquidating trustee in bankrupty and §671 of the United States Code Annotated did not permit the levy of the tax. Judgment was for the plaintiff, permitting recovery of the tax paid under protest.

Section 671, Title 11, U.S.C.A., reads:

> "Any provision in this chapter to the contrary notwithstanding, all taxes which may be found to be owing to the United States or any State from a debtor within one year from the date of the filing of a petition under this chapter and have not been assessed prior to the date of the confirmation of a plan under this chapter, and all taxes which may become owing to the United States or any State from a receiver or trustee of a debtor or from a debtor in possession, shall be assessed against, may be collected from and shall be paid by the debtor or the corporation organized or made use of for effectuating a plan under this chapter: *Provided, however,* That the United States or any State may in writing accept the provisions of any plan dealing with the

assumption, settlement, or payment of any such tax. . . ."

The original act to establish uniform bankruptcy was passed in 1898. During the depression of the early 1930's, it became apparent many businesses could be saved from liquidation if they were permitted to reorganize their affairs. In 1934, Congress passed the first corporate reorganization provision. The only amendment which has been made was the Chandler Act of 1938, which added these words: "or any State." There is considerable authority that Chapter 10 is a special proceeding, designed for a specific purpose apart from the rest of the bankruptcy act. See Collier on Bankruptcy; Remington on Bankruptcy; and Gerdes on Corporate Reorganization.

The fundamental purpose of Chapter 10 proceedings is the preservation of the *status quo*, thereby permitting an occasion for amicable adjustment by debtor and creditors under the supervision of the bankruptcy court, avoiding liquidation with a view to rehabilitation, thus affording an opportunity to plan reorganization without a race between creditors and maintaining at the same time a going concern value for all parties in interest. 11 Remington on Bankruptcy (1961 Revision by Hayes), §4345, p. 13; *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939), 84 L.Ed. 110, 60 Sup. Ct. 1; *In re Western Tool & Mfg. Co.*, 142 F.2d 404 (6th Cir. 1944).

A Chapter 10 reorganization is not in the true sense a bankruptcy and the corporation is regarded as a going concern, not defunct. *Petition of Portland Electric Power Co.*, 162 F.2d 618 (9th Cir. 1947); *In re American Coils Co.*, 74 F. Supp. 723 (D.C. New Jersey 1947). If, on the other hand, the reorganization plan is not acceptable to the court, the petition may be dismissed or transferred into regular bankruptcy for liquidation. After all, Congress had no intention of providing a haven for corporations which are fit subjects for liquidation by ordinary bankruptcy methods. Collier on Bankruptcy (14th ed.), Chapter 15.08, etc.; 11 Remington on Bankruptcy (1961 Revision by Hayes), §4654, p. 486; 3 Gerdes on Corporate Reorganization, §1143, p. 1815.

In Senate Report No. 1916 to accompany House Report No. 8046, Revision of the National Bankruptcy Act, 75th Congress, 3d Session, 1938, it is said:

> "[T]he dismissal of the proceedings, or alternatively, the liquidation of the debtor . . . in the event . . . that no plan of reorganization is confirmed and consummated. A prior bankruptcy proceeding is to be continued from the point where it was stayed by the reorganization proceeding. . . ."

This suggests a liquidation-bankruptcy proceeding is different from a Chapter 10 reorganization. Also in Senate Report No. 482 to accompany House Report No. 5884, To Amend the Bankruptcy Act—Corporate Reor-

ganization, 73d Congress, 2d Session, 1934, it was said:

> "The [reorganization] plan shall provide adequate means for its execution which may include the transfer of all or any part of the property of the debtor to another corporation or to other corporations. . . ."

Thus, a sale of all the assets within the plan was contemplated by Congress. Therefore, a total sale does not imply liquidation, as respondent suggests.

It is clear that Congress did not perceive a Chapter 10 reorganization and liquidation be the same. It is also clear that a sale of all the assets, as here, is within the Congressional intent. Therefore, respondent's liquidation theories do not apply. Obviously Congress did not intend, under Chapter 10 and these circumstances, to exclude the collection of this tax.

The judgment is reversed.

BRADFORD, J.
Pro Tem

WE CONCUR:
ROSELLINI, C.J.
OTT, J.
HUNTER, J.
HALE, J.

REMITTITUR

SENFOUR INVESTMENT CO., INC., *Respondent,* v. KING COUNTY, a municipal corporation, *Appellant.*	No. 37840 King County No. 609562

This is to certify that the opinion of the Supreme Court of the State of Washington filed on July 15, 1965, became the final judgment of this court in the above entitled case on October 25, 1965. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

Pursuant to Rule 55 on Appeals, costs are taxed as follows:

One hundred forty-six and 73/100 ($146.73) dollars in favor of appellant and against respondent.

The Petition for Rehearing was denied by an Order dated October 25, 1965.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 25th day of October, A.D. 1965.

WILLIAM M. LOWRY
Clerk of the Supreme Court,
State of Washington

cc: COURT REPORTER
HON. CHARLES O. CARROLL
MR. JAMES E. KENNEDY
MR. WILLIAM L. PAUL, JR.
CROSON, JOHNSON & WHEELON
MR. ROBERT B. LESLIE

APPENDIX B

Pertinent Sections of Revised Code of Washington 28.45

28.45.020 "Seller" defined. As used in this chapter and in any ordinance enacted pursuant thereto, the term "seller," unless otherwise indicated by the context, shall mean any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, quasimunicipal corporation, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, non-profit or otherwise, but it shall not include the United States or the state of Washington.

28.45.050 Levy of Tax—Rate—Disposition of Proceeds. The county commissioners of any county are authorized by ordinance to levy an excise tax upon sales of real estate not exceeding one percent of the selling price. The rate of the levy shall be determined annually by the commissioners. The proceeds of the tax provided for in this chapter shall be placed in the county school fund and shall be used exclusively for the support of the common schools: Provided, That one percent of the proceeds of the tax provided for herein may be placed in the current expense fund of the county.

28.45.060 Tax on Sale of Property Located in County.

The real estate sales tax provided for herein shall be levied upon each sale of real property located within the county.

28.45.070 Tax Is Lien on Property—Enforcement. The tax herein provided for and any interest or penalties thereon shall be a specific lien upon each piece of property sold from the time of sale until the tax shall have been paid, which lien may be enforced in the manner prescribed for the foreclosure of mortgages.

28.45.080 Tax Is Seller's Obligation—Choice of Remedies. The tax levied under this chapter shall be the obligation of the seller and the county treasurer may, at his option, enforce the obligation through an action of debt against the seller or he may proceed in the manner prescribed for the foreclosure of mortgages and resort to one course of enforcement shall not be an election not to pursue the other.

APPENDIX C

The Trustee in Bankruptcy's Amended Plan for Reorganization

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

IN PROCEEDINGS FOR CORPORATE REORGANIZATION

In the Matter of HEART OF SEATTLE HOTEL CO., INC., *Debtor.*	No. 51268

TRUSTEE'S PROPOSED AMENDED PLAN FOR REORGANIZATION

To the HONORABLE WILLIAM J. LINDBERG, *District Judge:*

Comes now JAY G. LARSON, the duly qualified and acting Trustee herein, and proposes the following Amended Plan for Reorganization of the Debtor:

That a third party, corporate or otherwise, purchase from the Trustee all of the assets of Heart of Seattle Hotel Co., Inc., and Heart of Seattle Hotel Operating Co., Inc., the combined debtor, including not only its tangible or fixed assets but also its notes, subscription receivables, sales tax refund, and all other assets of every kind and description for the following consideration:

(1) Payment in full of the claims of unsecured creditors as follows: A sum of cash equal to one-half of the un-

secured claims, believed to be not more than $55,000.00, plus non-negotiable, non-interest bearing notes payable to said creditors for the balance of their claims, payable in two installments of 25%, one year apart, to be guaranteed by the company purchasing the assets of the debtor.

(2) Cash sufficient to pay all costs of administration and fees in reorganization, including the receiver's certificate to Norman Conkle for $5,000.00, delinquent taxes believed to be in the vicinity of $28,000.00, wage liens believed to be in the vicinity of $7,700.00; materialmen's liens believed to be in the vicinity of $13,400.00 and all delinquent payments on leases to Glickman, Moulas, Rosen Guthrie and Business Machines, believed to be in the vicinity of $5,300.00.

(3) The foregoing purchase shall be subject to the following contract and mortgages at whatever balances and in whatever state of delinquency they may be at the time of transfer:

(a) The present mortgage to Mid-Continent Investment Company now held by Exchange Bank & Trust Company in the face amount of $750,000.00.

(b) The Kamins Furniture chattel mortgage, now held by American Acceptance Corporation in the face amount of $180,087.76, on which there remains a claimed balance of $165,113.16.

(c) Conditional sale contracts wherein Dohrmann Hotel Supply Company is the vendor, upon which there is a claimed past due balance of $41,422.89.

Respectfully submitted,
JAY G. LARSON,
Trustee

APPENDIX D

Excerpt from Brief of Senfour Investment Co., Inc., to the Washington Supreme Court (Pages 7, 8)

Conversely, sales winding up the debtor's business, disposing of his assets pursuant to the court's order to so liquidate are not within the purview of §960 because now the court in finally disposing of the debtor is directly engaged in executing through the trustee in bankruptcy the bankruptcy power of the United States and such is an act of the United States and any tax upon this judicial process is tantamount to a tax upon the United States. *California State Board of Equalization v. Goggin*, (9th Cir. 1957), 245 F.2d 44, 45. The instant sale thus falls within the rule, *viz.*, the trustee's proposed plan (St. 2), the order of the U. S. District Court confirming the plan (St. 1), the affidavit of the trustee in bankruptcy (St. 4), show that the sale of the Heart of Seattle Hotel Company site by the trustee in bankruptcy constituted irrefutably an abolition of the business operations and existence of the debtor, a sale of all of its assets subsequent to adjudication of insolvency and was made directly pursuant to the court's order to so dispose of the debtor corporation in execution of the plan of reorganization.

Assuming for purposes of argument that this sale was not technically a liquidation, the rationale given for exempting sales in "liquidation" from the provisions of §960

is as eminently present in this case. As distinguished from a sale by the trustee when carrying on the business of the debtor (only incidentally under the authority of the United States), the instant sale was the execution, in fact the consummation, of the ultimate disposition of the debtor ordered by the Bankruptcy Court and hence constituted a deliberate exercise of the judicial function of the federal court. The tax for which appellant contends in such instance becomes a tax upon the essential process of the United States.

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No. ~~1141~~ 93

Supreme Court of the United States

OCTOBER TERM, 1965

SENFOUR INVESTMENT CO., INC., *Appellant,*

vs.

KING COUNTY,
a Legal Subdivision of the State of Washington,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM AND APPELLEE'S BRIEF

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THE ARGUS PRESS SEATTLE, WASHINGTON

No. 1141

Supreme Court of the United States

OCTOBER TERM, 1965

SENFOUR INVESTMENT CO., INC., *Appellant,*

vs.

KING COUNTY,
a Legal Subdivision of the State of Washington,
Appellee.

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MOTION TO DISMISS OR AFFIRM AND APPELLEE'S BRIEF

This motion and brief is submitted pursuant to authority granted by the court on May 17, 1966.

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the Supreme Court of the State of Washington be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

MOTION TO DISMISS

Alternatively, appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment of the Supreme Court of the State of Washington be dismissed on the ground that it does not present a substantial federal question.

OPINION BELOW

The case below is King County Superior Court Cause No 609562, being an action to recover an excise tax assessed under the terms of Revised Code of Washington 28.45 and King County Resolution (Ordinance) No. 25672. The State Supreme Court decision is reported at 66 Wash. Dec. 2d 629, 404 P.2d 760.

QUESTIONS PRESENTED

Appellant accurately states the question presented at pages 3 and 4 of the Jurisdictional Statement.

STATUTES INVOLVED

The statutes involved are Revised Code of Washington 28.45.050 reproduced at Appendix B of the Jurisdictional Statement; and Sections 667 and 671, Title 11, United States Code, reproduced at page 8 below:

STATEMENT

There is no dispute as to the facts.

(a) The Pleadings – Complaint

The complaint (R.0001) alleges "that the sale (of real estate) was pursuant to a plan of liquidation of the Heart of Seattle Hotel," such sale being by "Jay G. Larson, acting as Trustee in Reorganization of the Heart of Seattle Hotel Co., Inc," in United States District Court Cause No. 51268.

King County Treasurer assessed a real estate excise transfer tax of $3,000 on September 3, 1963, under the

terms of Revised Code of Washington 28.45 and the appropriate county ordinance.

Larson paid this sum and has assigned his claim to plaintiff.

Paragraph V of the claim states that the transaction is immune from taxation under the National Bankruptcy Act.

(b) The Answer

The amended answer (R.0003) is that the transaction was an arrangement and is taxable under the terms of Title 11, Section 671, U.S. Code.

(c) The Evidence

Defendant's request for admission (of authenticity of documents) (R.0007, et seq.) contains first the assessment of Tax E 526511, showing the real property description, the parties to the transfer, the tax assessed and the fact that $3,000 was paid on September 3, 1963.

The County Resolution No. 25672, dated April 15, 1963, effective for the year commencing May 1, 1963, was put in evidence.

The abstractor's line abstract on the real estate transferred shows documents recorded from October 5, 1961, to November 13, 1963. The instrument which enabled the Treasurer to make his assessment is No. 57, the warranty deed.

Instruments 1 through 6 place the title to the real

estate in Heart of Seattle Hotel Co., Inc., the last being recorded November 24, 1961.

The bankruptcy arrangement proceedings shown on item 60 as having been commenced February 7, 1963, after numerous chattel mortgages and more laborers' and materialmen's liens were filed up to January 29, 1963.

R.0009-.0021 is the Federal Court's order in USDC No. 51268 of August 13, 1963, approving the plan of arrangement. This shows the proceeding is under Chapter X of the Bankruptcy Act. Attached to the order is Exhibit A, the "amended Plan of Reorganization" of Heart of Seattle Hotel Co., Inc. The plan proposes that a "third party, corporate or otherwise" purchase all assets and pay all debts, according to class, except the $750,000 mortgage (then in favor of Exchange Bank & Trust Company), the chattel mortgage and conditional sale as follows:

½ the unsecured claims not exceeding	$ 55,000.00
Plus notes for the balance	55,000.00
Cash to pay costs of administration and fees of reorganization in excess of	5,000.00
Federal taxes	28,000.00
Wage Claims	7,700.00
Materialmen's claims	13,500.00
Lease payments	5,300.00
	$169,500.00

The property was ordered transferred subject to:

Mid-Continent Investment Co. mortgage	$750,000.00
Kamins Furniture Chattel Mortgage balance	165,113.16
Conditional Sale contract of Dohrman Hotel Supply	41,422.69
	$956,535.85

The order confirming the plan of arrangement discloses that the "third party" is plaintiff and has been formed "to purchase the assests of the debtor."

The trial court granted plaintiff's (appellant's) motion for summary judgment and awarded judgment against the county for $3,000 plus interest.

The Washington State Supreme Court reversed the trial court and dismissed the complaint in an opinion (R.0022-0026) which became final on October 25, 1965 by return of the Remittitur to the Superior Court (R.0028).

ARGUMENT

This is a transfer tax and permission to assess the tax is granted by Section 671 of the National Bankruptcy Act.

Unquestionably, a transfer occurred by delivery of the warranty deed on September 3, 1963, and the consideration therefor appears in the specification of the amount of new cash to be paid by plaintiff.

R.C.W. 28.45.030 provides:

> "As used in this chapter, the term 'selling price' means the consideration, including money or any-

> thing of value, paid or delivered or contracted to be paid or delivered in return for the transfer of the real property or estate or interest in real property, and shall include the amount of any lien, mortgage, contract indebtedness, or other incumbrance, either given to secure the purchase price, or any part thereof, or remaining unpaid on such property at the time of sale."

The ordinance is identical.

Therefore, when a substantial consideration is paid, here in excess of $169,500.00, there can be no deduction of the price of a real estate mortgage lien.

No challenge was made directly to this value basis.

The Bankruptcy Act is so clearly permissive here that no substantial federal question exists meriting further argument.

No contention was made in the state courts that the transfer tax is in legal fact a stamp tax prohibited by Section 667 of the Bankruptcy Act. Washington courts have consistently held the tax to be an excise on the act of transfer.

Subject to nuances of local interpretation, the following states appear to have a similar tax of apparent similar applicability: Delaware, Hawaii, Massachusetts, Pennsylvania, Tennessee, and West Virginia. Typically, evidence must appear on the face of the deed that the tax has been assessed and paid (if not exempt) before recording is permitted.

According to Commerce Clearing House, the following states prescribe documentary stamp taxes on deeds and mortgages: Alabama, District of Columbia, Florida, Kansas, Maryland, Minnesota, Mississippi, Nebraska, New York, Oklahoma, South Carolina, Tennessee, Virginia, and Washington (R.C.W. 82.20, 1935). The Federal Stamp Tax is the Act of June 13, 1898 (C. 448, 30 Stat. 448, 460).

The Washington Supreme Court, in *Mahler v. Tremper, King County Treasurer* (1953), 40 Wn.2d 405, 411; 243 P.2d 627, stated that the prohibition against recordation is an enforcement procedure to collect the tax on the transfer.

The Bankruptcy Act is organized as follows by Chapters:

I. Definitions.
II. Creation of Courts of Bankruptcy and their jurisdiction.
III. Bankrupt.
IV. Courts and procedure therein.
V. Officers, their duties and compensation.
VI. Creditors.
VII. Estates.
VIII. Railroad reorganizations.
IX. Debt readjustments by municipalities and taxing districts.
X. Corporate reorganizations.
XI. Arrangements.

XII. Real property arrangements.

XIII. Wage earner's plan.

The first seven chapters provide the so-called "full" or "straight" bankruptcy, by which the bankrupt surrenders his property in return for a defense against his debts.

The plans of Chapters VIII through XIII make use of portions of the federal bankruptcy powers and general equity powers of the courts.

Of course, no part of the Bankruptcy Act becomes operable unless insolvency exists, that is, (1) liabilities exceed assets or (2) the person is unable to pay his debts as they mature.

As was said by Circuit Judge Parker in *Campbell v. Alleghany Corporation*, 75 F.2d 947, "the power granted Congress over the subject of bankruptcies is plenary." 6 Collier on Bankruptcy (14th ed.) 95.

Sections 667 and 671, Title II US Code define all tax liability in a Chapter X proceeding.

Sec. 667:

> "The issuance, transfer, or exchange of securities, or the making or delivery of instruments of transfer under any plan confirmed under this chapter, shall be exempt from any stamp taxes now or hereafter imposed under the laws of the United States or of any State."

Sec. 671:

"Any provision in this chapter to the contrary notwithstanding, all taxes which may be found to be owing to the United States or any State from a debtor within one year from the date of the filing of a petition under this chapter and have not been assessed prior to the date of the confirmation of a plan under this chapter, and all taxes which may become owing to the United States or any State from a receiver or trustee of a debtor or from a debtor in possession, shall be assessed against, may be collected from and shall be paid by the debtor or the corporation organized or made use of for effectuating a plan under this chapter: *Provided, however,* That the United States or any State may in writing accept the provisions of any plan dealing with the assumption, settlement, or payment of any such tax."

In the state courts, counsel argued that the precise form of reorganization was in fact a liquidation, and therefore the state should not be permitted to hinder, harass, or impede a Federal order of bankruptcy liquidation, by taxing a transfer prescribed by such order.

Appellee argued that the phrase "all taxes which may be found to be owing" of Sec. 671 means "all taxes" including levy of an excise tax on an event of transfer.

It is appellee's position that reorganization is not liquidation, and that the rationale of the liquidation cases has no application to Chapter X principles of taxation.

In *Fidelity Assurance Assn. v. Sims* (1943) 318 U.S. 608, 621, the court said:

"It was suggested at the bar that, even if liquidation is all that can be hoped, this would be better managed by a single bankruptcy court than in several

separate proceedings. The difficulty with the suggestion is that Congress did not intend resort to Chapter X to be had for the mere purpose of liquidation. The scheme of the chapter precludes any such conclusion. The mandate of § 144 is clear that unless the judge is satisfied the petition was filed in good faith he must dismiss it. Under the predecessor of Chapter X — § 77B of the Bankruptcy Act — the district judge was given authority, by subsection (c) (8), under certain circumstances, to 'direct the estate to be liquidated, or direct the trustees to liquidate the estate . . .' In Chapter X, on the other hand, § 236 (2) provides that if no plan is approved or accepted, or if it is not consummated, the judge may, after hearing all persons in interest, adjudge the debtor a bankrupt or dismiss the proceeding, as he may decide is in the interest of creditors and stockholders. Thus the statute does not contemplate a liquidation in a Chapter X proceeding but a liquidation in ordinary bankruptcy or a dismissal outright.

* * *

"Congress did not intend a Chapter X case to be turned into a liquidation proceeding at the outset, but intended the litigation to become a straight bankruptcy only after the failure to consummate a plan, and meant to limit the parties to their remedy in ordinary bankruptcy in all other cases. It would, therefore, be a perversion of the Congressional intent to treat the present as a liquidation proceeding, since the rights of persons having liens or security pledged for their claims differ widely in the two sorts of bankruptcy."

Decisions, such as *California State Board of Equalization v. Goggin* (1957), 245 F.2d 44, relating solely to "ordinary" or full bankruptcy, have no application in the instant case.

It will be noted that in the first seven chapters of the Act, there is no mention of taxes except as to classification of priorities – Sec. 64 (a) (4), and as to taxes on operation of a business. The immunity discovered by Judge Fee in the *Goggin* cases, *supra,* is purely one of decisional law.

The only prohibited excise tax is the stamp tax, and all other state taxes must be paid.

In the arrangement chapters, however, Congress has directed the payment of "all taxes," withdrawing therefrom only documentary taxes.

Congress having selected for immunity only this one category of tax from the multitude of different types of taxes, we must assume that "all taxes" means all other taxes.

Imposition, at one time or another of these types of taxes has been sustained by the courts: State income taxes (including adjustments), *Redwine v. Citizens & Southern National Bank* (CA 5, 1951) 189 F.2d 328. County real and personal property ad valorem taxes; *Berryhill v. Gertsel* (CA 5 1952) 196 F.2d 304. State unemployment compensation tax, *In re Lambertville Rubber Co.* (DC NJ 1936) 27 F. Supp. 897 (Modified on other grounds, 111 F. 2d 45). Corporate franchise taxes; *In re Pressed Steel Co. of New Jersey* (1938) 100 F. 2d 147.

Sections 667 and 671 are part of the Chandler Act. As Collier on Bankruptcy (Vol. 6, p. 5147) observes, the

old composition scheme referred only to Federal taxes, and the 1938 amendment simply added the words "or any state" to Sec. 671 to eliminate the free ride reorganizing corporations had gotten by avoidance of all state taxes.

The prohibition against state stamp taxes first appeared in Sec. 667. 6 Collier on Bankruptcy (14th ed.) p. 5148. Obviously, it would have been surplusage to prohibit specially (the state stamp tax) where the prohibition existed generally (all state taxes).

Nevertheless, Congress did touch in 1938 specially on the subject of state stamp taxes. We assume that such specificity reinforces the generality as to other taxes prescribed in Sec. 671. The rule *"expressio unius est exclusio alterius"* is even more applicable where the exclusion is express. See *Bradley v. Department of Labor and Industries* (1958) 52 Wn.2d 780, 784, 329 P. 2d 196 for a discussion of the rule. *"Ejusdem generis"* does not work in reverse. *Republic Investment Co. v. Naches Hotel Co.* (1937) 180 Wash. 176, 181, 678 2d 858.

The Washington courts have consistently held this tax is on the act of transfer. "If the event is a taxable one, it must be held to be such because it constitutes a 'conveyance ... for a valuable consideration' ". *Deer Park v. Stevens County* (1955), 46 Wn.2d 852, 855; 286 P. 2d 98. "We held the distribution was a taxable event . . . by reason of an assumption by the stockholder of the cor-

poration's liabilities". *The Doric Company v. King County* (1959), 57 Wn.2d 640, 643; 358 P. 2d 972. "We conclude that the transactions . . . constituted transfers of ownership for a valuable consideration". *Christensen v. Skagit County* (1965) 66 Wash. 2d. 73, 401 P. 2d 334.

The Washington courts have so clearly and correctly defined the excise tax as on the event of transfer, and such form of tax is within the definition of "any state tax" authorized by Sec. 671 of the Act, we submit no substantial federal question exists and the appeal ought to be dismissed without further argument.

Alternatively, the Washington Supreme Court decree may be affirmed for the same reasons.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 93

SENFOUR INVESTMENT CO., INC., APPELLANT

v.

KING COUNTY

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON[1]

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted pursuant to the Court's order of May 16, 1966, inviting the Solicitor General to express the views of the United States in this case.

[1] Although the appellant invokes the jurisdiction of this Court by appeal under 28 U.S.C. 1257(2), it would seem that the appropriate method of review is by petition for a writ of certiorari under 28 U.S.C. 1257(3). "[A]n attack upon a tax assessment or levy * * * on the ground that it infringes a taxpayer's federal rights, privileges, or immunities, will not sustain an appeal * * *" (*Rohr Aircraft Corp.* v. *County of San Diego*, 362 U.S. 628, 629–630, quoting *Charleston Federal Savings & Loan Assn.* v. *Alderson*, 324 U.S. 182, 195). Here appellant's claim is that the Judicial Code and the Bankruptcy Act immunize it from the tax. See text, *infra*. Accordingly, under 28 U.S.C. 2103 the appeal should be dismissed and the appeal papers treated as a petition for certiorari.

222-888—66

The question presented is whether the sale by a trustee of the property by a debtor in reorganization under Chapter X of the Bankruptcy Act, pursuant to a plan for the sale of its assets, may be subjected to a State sales tax. The appellant corporation, the purchaser of such property, claimed immunity from the tax in reliance upon *California State Board of Equalization* v. *Goggin*, 245 F. 2d 44 (C.A. 9), certiorari denied, 353 U.S. 961. *Goggin* held that the Bankruptcy Act exempted from a California retail sales tax sales made by a trustee in bankruptcy in liquidating a bankrupt estate. In the present case the Supreme Court of Washington distinguished *Goggin* on the ground that there the sale took place in bankruptcy, while here it occurred as part of a reorganization plan under Chapter X; and it upheld the imposition of the Washington sales tax upon the transfer of the debtor's real property.

1. The basis upon which the Supreme Court of Washington distinguished *Goggin* seems unpersuasive. The rationale of *Goggin* was that "a state tax upon a sale of tangible property under an order of the bankruptcy court directing liquidation" is "an unlawful interference with" "the liquidation process" of the bankruptcy court (245 F. 2d at 45, 46). But it is difficult to see why the imposition of a State tax upon the sale of a debtor's property is any less an interference with "the liquidation process" of the bankruptcy court merely because the sale takes place as part of a plan or reorganization under Chapter X rather than in straight bankruptcy.

On the other hand, the fact that the liquidation in

the present case was not of the business itself, but only of a particular corporation that conducted it, would afford a more persuasive basis for distinguishing *Goggin*. Unlike the sale of the bankrupt's assets in *Goggin*, here the business was sold as a going entity, which the purchaser presumably intended to continue to operate. Thus, the sale of the debtor's assets in the present case pursuant to a Chapter X plan of reorganization did not constitute an exercise of the bankruptcy's court's "liquidation process" in the same sense in which such process was used in *Goggin*.

Moreover, the correctness of *Goggin* is doubtful. The imposition of such a State tax would not seem to interfere with the functioning of the bankruptcy court. In addition, *Goggin* rests upon a questionable statutory interpretation. The court relied upon 28 U.S.C. 960, which provides that officers or agents "conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." It reasoned that since Congress in Section 960 subjected to State taxation only a trustee "conducting [a] business," it impliedly immunized from such taxation other acts of the trustee, including liquidation selling (245 F. 2d at 46–48).

But such reasoning is dubious. This Court has been most reluctant to find a congressional intention to grant immunity from State taxation in the absence of clear legislative intent to do so. See *Swarts* v. *Hammer*, 194 U.S. 441, 444; *Graves* v. *New York ex*

rel. O'Keefe, 306 U.S. 466, 480; and *Boteler* v. *Ingels*, 308 U.S. 57, 60–61. See also Wurzel, *Taxation During Bankruptcy Liquidation*, 55 Harv. L. Rev. 1141, 1166–1167; Note, *State Taxation of Bankruptcy Liquidations: Federalism Misconceived*, 67 Yale L. J. 335. Nothing in the legislative history of Section 960 reflects any intention to confer immunity. On the contrary, the statute was enacted in response to a lower court decision that a federal receiver operating a gasoline distribution business was not liable for a State sales tax on motor fuel;[2] its purpose was to preclude the substantial revenue losses to the States that that decision portended. H. Rep. 1138, 73rd Cong., 1st Sess.; S. Rep. 1372, 73rd Cong., 2d Sess.

In sum, the Supreme Court of Washington may have reached the right result, although not for the reasons which it gave.

2. Although the Securities and Exchange Commission is a statutory party in most Chapter X reorganizations involving a substantial number of public securities holders,[3] it has not had any occasion to consider the effect upon the feasibility of plans of re-

[2] *Howe* v. *Atlantic, Pacific & Gulf Oil Co.*, 4 F. Supp. 162 (W.D. Mo.), reversed *sub nom. Kansas City, Mo.* v. *Johnson*, 70 F. 2d 360 (C.A. 8), certiorari denied, 293 U.S. 617.

[3] Bankruptcy Act, Section 208, 11 U.S.C. 608. In addition to thus participating in such proceedings, the Commission is informed of all Chapter X proceedings (Section 265 of the Bankruptcy Act, 11 U.S.C. 665) and has certain other statutory duties in connection with those proceedings. See, *e.g.*, Section 172 of the Bankruptcy Act (11 U.S.C. 572), requiring the district judge in some cases, and authorizing him in others, to submit proposed plans of reorganization to the Commission for an advisory report.

organization of permitting the States to impose sales taxes on transfers thereunder. Thus, the Commission's experience suggests that the decision below does not present a recurrent issue of importance in Chapter X proceedings. Similarly, the experience of the Department of Justice and the Internal Revenue Service does not indicate that the imposition of such State sales taxes has caused any problems in the collection of federal taxes. Accordingly, as far as the interest of the United States is concerned, there is no occasion for review by this Court.

Respectfully submitted.

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Securities and Exchange Commission.

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OCTOBER TERM, 1965

No. [redacted] 93

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

REPLY OF APPELLANT TO MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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REPLY OF APPELLANT TO MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE[1]

ARGUMENT IN REPLY

The United States as Amicus Curiae concludes that there is no occasion for review as concerns the interest of the United States for the reason that the decision be-

1. This Reply is submitted under the provisions Rule 24(3) in the eventuality that the appeal papers are treated as a petition for certiorari under 28 U.S.C. 2103.

low by the Supreme Court of the State of Washington, does not present the Securities and Exchange Commission with a recurrent issue of importance in Chapter X of Proceedings, and because federal tax collections have not been impaired thereby. No answer is made concerning the effect upon the judicial function of formulating and carrying out corporate reorganizations. Unless such a tax is of no consideration to creditors, purchasers and other persons involved in the reorganization, it of necessity hampers the court's initiative in planning and executing the final disposition of the debtor. In *California State Board of Equalization v. Goggin*, 245 Fed. 2d 44 (C.A. 9), certiorari denied, 353 U.S. 961, the court found taxation upon the event now in question to be categorically a burden upon that function of the United States.

The decision below is in direct conflict with *Goggin*, *Amicus'* distinction based upon dispersion of the assets versus their acquisition in toto notwithstanding. What became of the various assets upon liquidation of the debtor is singularly excluded from the court's concern in *Goggin*. The Court of Appeals determination was premised upon the identity of the seller and the purpose of the sale:

> "Any act which hinders, delays or burdens the accomplishment of this vital purpose constitutes an unlawful interference with the process of the court of bankruptcy and is invalid."
>
> "The tax is in fact upon the sale; the sale is for the essential purpose of liquidating; the liquidation process was burdened thereby."

The *Goggin* decision is dircetly impeached by Amicus upon the assumption that by giving meaning and intention to the phrase "applicable to such business to the same extent as if it were conducted by an individual or corporation" (28 U.S.C. §960) the Court of Appeals erroneously assumed an intent to immunize other acts of the trustee. Appellant submits that instead the court in *Goggin* observed the particularity of the Congressional permission to tax with respect to that power of the United States emanating from Article 1, §8 of the Federal Constitution:

> "Congress passed a specific statute relative to a trustee engaging in business in order to conform to the burdens borne by other members of particular business communities."

See also *In re West Coast Cabinet Works*, 92 F. Supp. 636, 640 (S.D. Calif. 1950):

> "The Congressional Record, 73 Congress 2(d) Session P. 6656, shows us that the bill prior to its amendment on the floor of the House, contained the word 'receiver' only, and a statement was made at that time that it was directed toward receivers and corporations appointed to run the business' . . . *et seq.*"

Goggin lays down a clear test of the taxability of sales made by trustee in bankruptcy. That decision was made with reference to principles of dual sovereignty and draws a line of demarcation important to creditors, debtors and other persons becoming involved in reorganization proceedings to whom such a tax is not an inconsiderable factor in finding workable solutions. The *Goggin* rule

should therefore be maintained, rather than diluted through denial of review, by summary reversal of the decision below.

Respectfully submitted,

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